



REPUBLIC OF KENYA



KENYA LAW
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**Barasa v Masinde (Environment & Land Case 35 of 2015)
[2022] KEELC 3883 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3883 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 35 OF 2015**

BN OLAO, J

JULY 28, 2022

**IN THE MATTER OF LAND PARCEL NO. WEST BUKUSU/SOUTH
MYANGA/1426**

AND

IN THE MATTER OF ADVERSE POSSESSION

AND

**IN THE MATTER OF SECTIONS 7, 17 AND 38 OF THE LIMITATION OF
ACTIONS ACT CHAPTER 22 LAWS OF KENYA**

BETWEEN

TECLA NAKHANU BARASA PLAINTIFF

AND

PROTUS WAFULA MASINDE DEFENDANT

RULING

- (1) In the course of this trial, the plaintiff sought to produce as his evidence the original land sale agreement dated 24th April 1991 and which had been marked for production because Mr Wamalwa Counsel for the defendant had objected to the plaintiff producing it and insisted on the maker doing so.
- (2) When the matter came up for further hearing on 30th June 2022, Mr Milimo Counsel for the plaintiff applied to have him produce the said agreement since the maker one Vincent Wafula had since passed on. However, Mr Wamalwa objected stating that there was no evidence that the said Vincent Wafula was infact deceased. And even if the said Vincent Wafula was now deceased, there are other witnesses who can be called in his place. That this Court should not blindly accept the documents.



- (3) In response, Mr Milimodid added that the application is made in good faith and whereas the plaintiff could not remember when Vincent Wafuladied, it was indeed true that he is deceased.
- (4) Although Mr Milimodid did not cite the relevant provision on which his application was hinged, Section 35(1) of the *Evidence Act* deals with admissibility of documentary evidence as to facts in issue. It reads: -

35(1) “In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say –

- a. if the maker of the statement either –
- i. had personal knowledge of the matters dealt with by the statement;
 - or
 - ii. where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

- b. if the maker of the statement is called as a witness in the proceedings: -

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable.” Emphasis mine.

This Court has been told that Vincent Wafula the maker of the agreement dated 24th April 1991 is deceased. I did not hear Mr Wamalwa deny that fact. Indeed, if it was not true, his client who was in Court would have said as much. The fact that the defendant did not deny that assertion can only mean that it is true. It is of course true that a Death Certificate would have been the best evidence to prove that the said Vincent Wafula is deceased. However, unless there is evidence to suggest that the plaintiff is misleading the Court on that issue, there is no reason why her evidence should be disregarded by this Court. In any event, I observed her testify and she did not strike me as a dishonest witness. I do not see how the plaintiff would lie about death of a witness who would in fact be supporting her case.

- (5) In the circumstances, I am satisfied that the said Vincent Wafula is deceased. He cannot therefore be called to testify. The sale agreement dated 24th April 1991 may therefore be produced as evidence in accordance with the provisions of Section 35(1) of the *Evidence Act*. The plaintiff will be recalled at the next hearing on 20th September 2022 for purposes of producing it as part of her evidence.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA BY WAY OF ELECTRONIC MAIL ON THIS 28TH DAY OF JULY 2022.

BOAZ N. OLAO.

J U D G E



28TH JULY 2022.

